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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]28

SAMUEL JOSEPH GIORDANO,
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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Petitioner Samuel Jospeh Giordano prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment convicting the petitioner filed and entered by the United States District Court for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at — F. 2d —, and is set forth in Appendix A to this Petition (App. 31-39). The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 4, 1967 (App. 40). The mandate of the United States Court of Appeals for the Sixth Circuit was issued on December 27, 1967 (App. 40). The time for the filing of this Petition was extended until February 2, 1968, by order of Associate Justice Potter Stewart, entered on January 4, 1968, and the execution of the mandate was also stayed until the Petition is filed and this Court disposes of this cause, by order of Associate Justice Potter Stewart, entered on January 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a violation of Title 18 U.S.C. §152 can be based exclusively upon acts done prior to the institution of bankruptcy proceedings, in the absence of actual or constructive notice to the defendant, who is not the bankrupt, of the institution of such proceedings, and the appointment of a receiver or trustee.

2. Whether a conviction for violation of Title 18 U.S.C. §152, for concealing assets from the receiver or trustee

in bankruptcy, can be based upon a net worth accounting statement, prepared by an agent of the F.B.I., which net worth statement is based upon books and records of the bankrupt which are admittedly incomplete and inaccurate, and there is no other direct or circumstantial evidence of concealment.

3. Whether the rights of petitioner as to due process of law and the equal protection of the law were violated when the trial judge, acting as the trier of the facts, acquitted one defendant upon the basis that the assets allegedly concealed were not identified as belonging to the bankrupt estate, and convicted the petitioner upon the basis that the identical assets were identified as part of the bankrupt estate.

4. Whether the knowledge and fraudulent intent required by Title 18 U.S.C. §152 and Title 18 U.S.C. §2 can be inferred from the acts performed by an employee in the normal course of his employment, which acts aid, assist and facilitate his employer, the bankrupt, in the realization of the employer's illegal purpose, so as to charge the employee as a co-conspirator and/or aider and abettor in such illegal purpose, without other evidence that the employee knew of the illegal purpose of his employer.

STATUTES INVOLVED

The statutes upon which the indictment of the Petitioner was based are Title 18 U.S.C. §152, Title 18 U.S.C. §2, and Title 18 U.S.C. §371, and are printed as Appendix B to this Petition (App. 41-42).

STATEMENT

(The following method of citing record reference is used herein: Citations to the Petitioner's appendix to his brief in the Court of Appeals have the suffix "a" and no prefix. Citations to the Respondent's Appendix in the Court of Appeals have the suffix "b" and no prefix; citations to unprinted portions of the proceedings on the original trial are cited to the typewritten transcript. These citations have the prefix "Tr." and no suffix. Citations to the Appendix to this Petition have the prefix "App" and no suffix.)

Petitioner, Samuel Joseph Giordano, was indicted in a three-count indictment, together with co-defendants Eugene Ellsworth Ayotte and Matthew Rubino, for conspiracy to conceal assets of a bankrupt estate (Count I); concealing such assets (Count II) and concealing assets of the bankrupt estate specifically on September 9, 1930 (Count III). The case was tried to a District Judge of the Eastern District of Michigan Southern Division, sitting without a jury. The Petitioner and co-defendant Ayotte were convicted of Counts I and II, and acquitted of Count III. The other co-defendant, Matthew Rubino, was acquitted on all three counts. Petitioner and Ayotte appealed to the United States Court of Appeals for the Sixth Circuit. The convictions of both Petitioner and Ayotte were affirmed. Petitioner alone seeks review of the decision of the United States Court of Appeals for the Sixth Circuit by writ of certiorari.

The indictment in this cause was founded upon the activities of the Palm Furniture Company in Detroit, Michigan. The evidence indicated that the defendant, Eugene Ellsworth Ayotte, using the pseudonym, Henry Oliva, instituted the operation of the Palm Furniture Company first by registering the name with the Clerk of Wayne County on June 3, 1960. The assumed name certificate indicated that Henry Oliva, who gave as his residence address the address of the petitioner's former wife, was doing business as Palm Furniture Company (24a, 43b). Ayotte then rented the premises at 14409 East Warren Avenue, Detroit, Wayne County, Michigan from the owner thereof, Sam Misuraca, for the operation of the business (11b-14b). Misuraca never had any contact with petitioner and was unable to identify him (12b).

Ayotte then opened a bank account at the National Bank of Detroit on June 14, 1960 with an initial deposit of $1,600. On June 20, 1960 he deposited an additional $10,000. to this account (14a, 28a). The bank manager, James Horton, testified that Ayotte, representing himself as Henry Oliva, presented the assumed name certificate showing that he was the sole proprietor of Palm Furniture Company, and he was the sole owner of the account (24a, 32a). The petitioner, using the name Joseph Cardo, was hired as a buyer and sales manager for Palm Furniture Company, and given authority to sign checks on the account, first only as a co-signer, and later was authorized to sign checks independent of Ayotte's signature (26a, 27a). The evidence indicated that he co-signed only one check, and never signed any checks in his own name alone (Tr. 2187).

Ayotte then made arrangements to have the sign on the premises changed from Vogue Furniture to Palm Furniture. The petitioner was not involved at all in this arrangement (24b, 27b).

Ayotte was subsequently contacted by a representative of Dun & Bradstreet, who were seeking to establish the financial condition of Palm Furniture Company at the request of some of their subscribers who had been requested to supply merchandise to Palm (37b). Dun and Bradstreet dealt only with Mr. Ayotte, and requested a financial statement which was mailed to them a few days later (29b, 30b). Mr. Giordano, the petitioner herein, had no contact with Dun & Bradstreet, made no representations to them, and was not identified by the witness (29b).

The government alleged in the indictment that one of the overt acts in furtherance of the conspiracy was the filing of false financial statements (4b). The financial statement submitted to Dun and Bradstreet was admitted into evidence (46b), but the evidence introduced independently thereof indicated that the statements contained therein were in fact not false (Tr. 2079). The Assistant United States Attorney, in his argument to the Court, admitted that although the assertions in the financial statement were substantially true at the time the statement was made, they became false shortly thereafter by the removal of the funds from the bank (Tr. 2122, 2312). There was no showing that the petitioner had anything to do with the removal of such funds (Tr. 2192).

Petitioner, in the course of his employment as sales manager and buyer for Palm Furniture, came into contact with suppliers on several occasions. Several representatives of these suppliers were called as witnesses; without exception, each of them who indicated doing business with petitioner stated that he never represented himself to be the owner of the business (75b, 82b), that he was always represented to be the sales manager or buyer (68b, 75b, 87b) and that whenever a question of financing or credit

came up, he always referred the representative of the supplier to Mr. Oliva (52b, 68b, 75b, 82b).

Palm Furniture Company was in operation from June until the middle of August, 1960. During this time, the petitioner worked as the sales manager and buyer. He often told several of his friends that he was working there as a salesman, and several of them bought furniture at Palm (256b). When they did purchase such furniture, the petitioner usually introduced them to Ayotte and the money was paid to Ayotte or given to him by the petitioner (257b, 259b).

In the early part of August, 1960, two vacant buildings were rented on Mack Avenue by Ayotte. One, located at 8425 Mack Avenue, was rented through the instrumentality of one Robert Doyle, a friend of Ayotte's. The other, at 17415 Mack Avenue, was rented by Ayotte from one Ray Ponkey (212b). This rental came about when the petitioner mentioned to a real estate salesman, Donald Barker, who worked for petitioner's brother-in-law, Sam Lentine, that his boss was looking for vacant space to store furniture. Barker made the contact with Ponkey, and brought Ayotte and Ponkey together. The petitioner only made the initial contact with Barker, and had nothing further to do with the negotiation of the rental agreement (240b).

Certain part-time employees of Palm Furniture Company testified to taking furniture from one of the Mack Avenue warehouses and bringing the same to Palm on one occasion (188b). There was no evidence that any furniture was taken from Palm Furniture to either of these Mack addresses (181b). Although furniture was seen by the lessors on the premises of these Mack Avenue buildings, there was no evidence indicating that this furniture be-

longed to Palm Furniture (Tr. 2267). One of these employees testified that on one occasion after Palm Furniture closed, he helped Ayotte move some furniture from one of these Mack Avenue addresses to a farm in Algonac (130b, 131b). On cross-examination, he indicated that petitioner accompanied them on this trip (138b). The judge, as the trier of fact, in acquitting the co-defendant Rubino with reference to this specific occasion, ruled that there was no evidence indicating that the furniture so moved to Algonac belonged to the bankrupt estate (Tr. 2265).

On August 19, 1960, Palm Furniture was closed when one of the creditors sought to contact Ayotte. On August 23rd and 24th, 1960, a Deputy Wayne County Sheriff executed writs of replevin on the premises (55a). The premises were locked when he arrived, and with the cooperation of the owner of the premises, Sam Misuraca, a locksmith was called to make keys and change the locks (19b). The merchandise was replevined (55a); some merchandise was still left on the premises (55a); and the keys were turned over to the owner of the premises (19b). On August 26th, an involuntary petition in bankruptcy was filed, and Arthur M. Schueler was appointed receiver. A subpoena was issued for Ayotte in the name of Henry Oliva, and was returned unserved (235b). On August 30, 1960, Ayotte obtained the new keys to the premises from Mr. Misuraca (20b). Petitioner had nothing to do at all with this transaction, and Mr. Misuraca testified he never met the petitioner (Tr. 31).

The receiver took possession of the premises on September 1, 1960, and in the presence of the F.B.I. agent in charge of the cause, inventoried the merchandise then found on the premises (190a). He testified that thereafter no further merchandise was found to be missing from the premises (191a).

On September 22, 1960, Palm Furniture Company was adjudicated a bankrupt. On October 28, 1960, Arthur M. Schueler was appointed trustee of the bankrupt estate. He testified that during the time he was acting as receiver and trustee, he never had any contact with Ayotte. Service was made by publication (223b), and all mail directed to Henry Oliva, d/b/a Palm Furniture Company, which was sent by the Bankruptcy Court, was forwarded to him as receiver, because he had so directed the postal authorities on August 26, 1967 (174a, 175a). He testified that he learned that Ayotte and Oliva were one and the same person both from the F.B.I. agent and from Ayotte's attorney, but did not act on this information because of a conference he had with Referee Murphy of the Bankruptcy Court, in which the Referee advised him not to do anything because the F.B.I. was conducting an independent investigation (183a, Tr. 1641). No turn-over orders were ever directed to either Ayotte or the petitioner, nor was the petitioner served in any way with notice of the bankruptcy, or requested to appear and testify as to the whereabouts of the assets (186a).

The F.B.I. obtained some books and records of Palm Furniture from S. W. Frankford Accounting Services (266b), who were Ayotte's accountants, not only for Palm Furniture, but for other ventures as well (Tr. 1755). These books and records were admittedly incomplete and inaccurate (5b, 273b-276b). There was no opening inventory shown (285b). Checks which indicated on their face that they were for merchandise were not and could not be matched with the invoices in the records (283b). Sales which were admittedly made during July and August, and which were testified to by several of the government witnesses, were not recorded in the ledger, which only showed sales through the last week in June (279b). Credi-

tors' claims were not independently verified, either by the F.B.I., or the officers of the bankruptcy court (289b, 202a). There was no showing that any demand had been made upon Ayotte for any additional books and records (186a, 202a). There was no evidence that petitioner had any responsibility for, or ever had possession of, the books and records (Tr. 1538).

Based upon the admittedly incomplete books and records, the F.B.I. agent compiled a net worth accounting statement showing that merchandise of a value in excess of $80,000. was unaccounted for. This accounting statement formed the basis for both the trial court's and the Court of Appeal's determination that there had been in fact a concealment of assets by Ayotte and the petitioner, although the agent who compiled the statement testified that he did not take into account sales not reflected in the journal, replevined merchandise, or merchandise which had not been delivered in his calculations (295b-303b). There was no direct or circumstantial evidence tracing any assets identified as belonging to Palm Furniture Company into the possession of the petitioner subsequent to August 26, 1960.

The Court of Appeals for the Sixth Circuit affirmed the conviction of the petitioner, stating (App. 39):

> "While Giordano, alias Joe Cardo, occupied a junior position to Ayotte, and his activities were less observable, he could clearly be identified as aiding and abetting in the substantive offense in Count II (which contained a charge of aiding and abetting, 18 U.S.C. §2); as such, he was intimately involved in the subject matter of the conspiracy charge in Count I of the indictment."

REASONS FOR GRANTING THE WRIT

The basic consideration for granting certiorari in this cause rests upon the administration of the National Bankruptcy Act, and the federal criminal laws relevant thereto. The concealment of the assets of a bankrupt estate from the Bankruptcy Court and its officers, as well as the creditors of the bankrupt estate, frustrates the intent and purpose of the Bankruptcy Act, as well as the administration thereof. For this reason, Congress has seen fit to provide criminal penalties for the perpetration of such concealment.

However, because a great number of bankruptcies involve commercial establishments which employ persons who are not themselves bankrupt or in any way involved in a proprietary manner with the bankrupt, the extent of criminal liability which can be imposed upon such employees because of their involvement with the bankrupt should be carefully delineated.

In this cause, the United States Court of Appeals for the Sixth Circuit ruled that the "intimate involvement" of the petitioner in the activities of the bankrupt, his employer, was, without more, sufficient to warrant his conviction, not only as a co-conspirator, but also as an aider and abettor, and thereby, a principal in the substantive crime of concealment of the assets of a bankrupt estate.

Since all employees, particularly those possessed of the commendable attributes of loyalty, responsibility and obedience, are to a greater or lesser degree "intimately involved" in the business activities of their employers, the ruling of the court of appeals in this cause could set a very dangerous precedent which could involve numerous innocent persons employed by unscrupulous businessmen in extensive criminal liability.

The issues presented by this Petition are of great importance to the Government in the administration of the National Bankruptcy Act, and of equal importance to the determination of the rights of defendants in federal criminal prosecutions under Title 18 U.S.C. Sec. 152. This is further discussed under the enumerated reasons for granting the writ, which correspond to the numbers of the questions presented.

1. The first of the questions presented relating to whether acts done prior to the institution of bankruptcy proceedings can in themselves constitute a violation of Title 18 U.S.C. Sec. 152, has plagued the lower federal courts for years. The last time this Court addressed itself to this question was in 1915, in the case of *United States v. Rabinowich,* 238 U.S. 78, 59 L.Ed. 1211, 35 S. Ct. 682 (1915), wherein Mr. Justice Pitney, speaking for the Court, stated at page 1214:

> "It is at least doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee, as defined in 29b(1) (the predecessor statute to Title 18 U.S.C. Sec. 152) of the bankruptcy act, can be perpetrated by any other than a bankrupt or one who has received a discharge as such."

Since the decision in the *Rabinowich* case, the lower federal courts have been required to grapple with this problem on numerous occasions, and the decisions have varied, leaving the entire question in confusion.

In *United States v. Agnew,* 225 F. 650 (C.A. Wash.), the Court of Appeals held that in order to constitute the offense of concealing assets of a bankrupt estate, the concealment must have been effected after a petition in bankruptcy had been filed or a discharge granted.

In *Lawand v. United States* (C.C.A. Ohio 1929), 33 F. 2d 582, 14 Am. Bankr. Rep. N.S. 378, the Court of Appeals for the Sixth Circuit held that the concealment must occur during the bankruptcy, but it is not necessary that the assets so concealed be found in the possession of the bankrupt, proof of shrinkage of assets during the bankruptcy proceedings being sufficient.

However, in *Sultan v. United States* (5th Cir. 1957) 249 F.2d 385, the Fifth Circuit held:

> "The crime is concealment of assets from the specified court officers or creditors, and the acts can be done before, as well as after, bankruptcy. (*United States v. Fallman*, D.C. Mass. 28 F. Supp. 251; *Arine v. United States*, (9th Cir.) 10 F.2d 778, 779.)"

An opposite result was reached in *Edwards v. United States*, (9th Cir. 1959) 265 F.2d 302, 306, where the Ninth Circuit said:

> "The offense under the first paragraph of Section 152 does not arise until there is a duty to reveal or disclose, which duty under the terms of the indictment arose on or after May 7, 1953 (the date of filing the involuntary petition in bankruptcy). The fact that the sums of money were transferred or concealed on different dates in December, 1952 and January, 1953, does not create any offense under the first paragraph of section 152. There was then no officer of the bankruptcy court charged with the control or custody of such property, and there were then no creditors in any bankruptcy proceeding, pending against the corporation. Hence there was no duty on the part of the appellants to reveal or disclose such transfers on such specified dates."

In *United States v. Yasser*, 114 F.2d 558 (3rd Cir. 1940) the Third Circuit held:

> "At the time the defendant took the merchandise from Crawfords, Inc. and sold it, he could not have

> been guilty of the offense charged, even though he might have intended to conceal the property from the creditors of the corporation, since it was not then a bankrupt. It is his retention of the merchandise or its proceeds after the bankruptcy of Crawfords, Inc., which is relied upon to sustain the charge of wrongful concealment. A necessary element of the crime described in the statute is that the defendant *knowingly and fraudulently* conceal the property. *United States v. Comstock,* C.C., 162 F. 415; *United States v. Rhodes,* D.C., 212 F. 513. As used in the statute, the adverbs 'knowingly' and 'fraudulently' must have their natural signicance given to them. *Klein v. Powell,* 3 Cir., 174 F. 640. The essence of the crime is knowingly and fraudulently to conceal from the *receiver or trustee* in bankruptcy. It must, therefore, appear that the defendant had actual knowledge of the existence of a receiver or trustee in bankruptcy or that he willfully closed his eyes to facts which made the existence of such an officer obvious." (Emphasis by court.)

In *Rachmil v. United States,* (9th Cir.) 43 F.2d 878, certiorari denied 283 U.S. 819, 51 S. Ct. 344, 75 L.Ed. 1434, the Ninth Circuit stated, at page 880:

> "Under the plain import of the statute we think concealment, however flagrant in respect to creditors, prior to the institution of bankruptcy proceedings and the appointment of a trustee, cannot constitute the offense charged, and knowingly and fraudulently to conceal property from the trustee necessarily implies some knowledge on the part of the bankrupt of the existence of the trustee. Prior concealment may have some evidentiary bearing upon the question of concealment from the trustee after his appointment, but after all that is the essential and the only ultimate question."

The court of appeals in the instant cause, relying upon *Kaplan v. United States,* 7 F.2d 594 (2nd Cir. 1925); *United States v. Weinbren,* 121 F.2d 826 (2nd Cir. 1941) and *Greenspahn v. United States,* 298 F. 736 (7th Cir. 1924) held that the concealment of assets prior to the institution of bankruptcy proceedings could constitute a violation of Title 18 U.S.C. Sec. 152.

In view of the fact that the acts done by the petitioner in this cause were as an employee of the bankrupt, all of the acts done in relation to the bankrupt's business were prior to the institution of bankruptcy proceedings, while the business was still in operation. The acts committed by the petitioner, as shown by the evidence, were all directly related to his employment as a buyer and sales manager and on the surface appeared to be legitimate. However, because of the unscrupulous purpose of his employer, which was not shown by direct evidence to be known to the petitioner, these acts, albeit in the course of his employment, assisted his employer in the achievement of the illegal purpose, i.e., the accumulation of merchandise on credit, and the subsequent concealment thereof from the creditors.

If, as in the case at bar, employees can be held to be aiders and abettors in the illegal purposes of their employers, by doing acts within the scope of their employment, with the necessary element of knowledge and fraudulent intent imputed by the doing of such acts, then a determination of whether concealment prior to bankruptcy with no activity thereafter can constitute a violation of this statute is crucial. Since the employment of such individuals would normally terminate upon the filing of a petition in bankruptcy, or at least the identity of the employer would change to the receiver or trustee, the involvement of em-

ployees would necessarily precede the bankruptcy proceedings. With the decisions among the various Court of Appeals in conflict on the specific question herein presented, this Court should grant certiorari in this cause to define for the guidance of the lower federal courts whether acts constituting, or assisting in, the concealment of assets of a business which later becomes bankrupt constitutes a violation of Title 18 U.S.C. Sec. 152.

2. This Court should grant certiorari on the second question presented in this Petition, as to whether a determination of concealment can be based solely on a net worth accounting statement, since the decision of the Court of Appeals for the Sixth Circuit in this cause is in apparent conflict with the decisions in other Circuits. This Court has never spoken directly to the use of such methods of proof in proceedings arising under a charge of concealment of assets. In *Holland v. United States,* 348 U.S. 121, 99 L.Ed. 150, 75 S.Ct. 127 (1954), Mr. Justice Clark, speaking for this Court, approved the use of such accounting methods as proof of income tax evasion, but in so approving it, he pointed out the inherent pitfalls of such a method, and stated further:

> "While we cannot say that these pitfalls inherent in the net worth method forecloses its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. . . . Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system, though difficult for the prosecution to utilize, is equally hard for the defendant to refute."

In the instant case, the proof of concealment of assets rested almost exclusively on the determination of the F.B.I. agent, based on the available books and records, that in excess of $80,000 worth of merchandise was missing or

unaccounted for. This determination was based on the invoices he had available, the cancelled checks, and the sales indicated in the ledger, as verified by bank deposits. The records were admittedly incomplete and inaccurate. There was no opening inventory shown. Checks indicating payments for merchandise could not be matched with the available invoices. Merchandise was replevined and not taken into account. The sales that were taken into consideration only went through the end of June. The business was undeniably in operation into the middle of August, and testimony was introduced by the government as to several sales made to friends of the petitioner during the months of July and August. None of these sales were taken into consideration in the computation. Yet both the trial court and the Court of Appeals for the Sixth Circuit relied heavily on the agent's determination of the amounts of merchandise unaccounted for to sustain the conviction of the petitioner and his co-defendant for concealing assets.

The Court of Appeals for the Sixth Circuit relied on a previous Sixth Circuit case, *Rudin v. United States*, 254 F.2d 45 (6th Cir. 1958) in approving this method of proof. In so doing, it has apparently not taken into consideration the warning given by this Court in *Holland v. United States*, 348 U.S. 121, 99 L.Ed. 150, 75 S.Ct. 127 (1954) as to the caution which must be exercised in the use of such evidence. The decision is also in conflict with other Court of Appeals decisions which have recognized the limitations upon the use of this type of proof, particularly in the light of the *Holland* case.

In *United States v. Tatcher*, 131 F.2d 1002 (3rd Cir. 1942) a case which preceded *Holland*, the Third Circuit held:

> "A period of two and one half months elapsed between the date of the last entries in the bankrupt's

> books and records produced by the Government and the date upon which the petition was filed and the business was actually terminated. The evidence indicates that during that period some merchandise was stolen, some broken and some sold. As to how much of the $12,904.06 of the merchandise on hand as of June 1, 1936 was sold during the months of July and June and the first 17 days of August we can but speculate. It would be equally consistent with the evidence to infer that all the merchandise not stolen, broken or found on the premises was sold and the proceeds used to pay the business and personal expenses of the defendant and his partner as to infer that all or any part of that merchandise was concealed by the defendant. To justify conviction of crime where the evidence relied upon is circumstantial in nature, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. *United States v. Russo* (3rd Cir. 1941), 123 F.2d 420. As we have seen, the evidence relied upon to sustain the defendant's conviction is as consistent with his innocence as with his guilt. We conclude that the evidence did not sustain the charge of concealment of assets of the bankrupt estate from the trustee in bankruptcy on October 19, 1936."

In *United States v. Mathies* (3rd Cir. 1965) 350 F.2d 963, 966, the Third Circuit held in a case where net worth accounting methods showed shortage of $261,645.81 that:

> "The net worth method was approved by the Supreme Court in *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, but the opinion enjoins caution in making use of it. The Court pointed out that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, a statement equally true of closing net worth. It certainly is not unreasonable to require that when the Government's case in a criminal prosecution consists of circumstantial evidence developed by a mathematical process, there should

> be no uncertainty about the data on which the process is built, and in this case, beyond one or two rather vague inferences, there is very little, if anything, in the evidence, other than the inventory, to show the amount and value of assets on hand at the end of the accounting period. There is nothing at all to identify any particular merchandise on hand."

The petitioner respectfully submits that the circumstantial evidence based on a mathematical formulation is only as good as the data upon which it rests. The data used in arriving at the conclusion of unaccounted for merchandise in this cause was admittedly deficient. Petitioner submits that this Court should grant certiorari to review the question of both the propriety of this type of evidence and the necessary foundation which must underlie its use. The decisions of the Third Circuit and the Sixth Circuit are in conflict, and yet this question is of substantial importance in the administration of both the federal criminal law and the bankruptcy law. In this connection, Mr. Justice Black's observation in *Maggio v. Zeitz*, 333 U.S. 56, 92 L.Ed. 476, 493 is enlightening. In the enforcement of a turn-over order resulting from the determination that the bankrupt had concealed assets from the trustee, the Court issued a contempt order. This Court held the order invalid, and Mr. Justice Black, in a concurring opinion, stated:

> "Furthermore, the finding of possession of the merchandise as of 1943 may rest on an evidential foundation firm enough to support a civil turn-over order, but it is too shaky to support a sentence to prison. Accepting that finding, however, the presumption of present or 1945 possession from the possible 1941 or 1943 possession achieves a procedural result which runs counter to basic practice in our system of laws. For as the District Court said, it gives the prosecution the advantage of a 'presumption' which, of itself, was held to relieve

> the Government from offering further proof of petitioner's guilt in a case where forfeiture of his 'personal liberty and property was sought; it thrust upon the petitioner the burden of proving his innocence.' "

The decision in the Court of Appeals for the Sixth Circuit in the case at bar has achieved the same result which Mr. Justice Black warned against. By basing such a net worth computation upon insufficient books and records, the prosecution has then cast upon the petitioner the burden of making up the deficiency in the books and records, and thereby proving his innocence.

3. The issue presented by the third question in this Petition is based upon the fundamental concepts of due process of law and the basic guarantee of a fair trial in a criminal case, which are guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

The trial judge, sitting as the trier of the facts, without a jury, acquitted the co-defendant, Matthew Rubino, of all counts. In determining that the evidence was not sufficient to convict Rubino, the trial judge made the following determination of fact: (Tr. 2264-2268)

> "As I said before, the evidence discloses that some furniture was stored in two spots—called spots because they aren't quite—they don't quite raise to the dignity of warehouses, they aren't that big, they are small stores, as I recollect—small, vacant stores.
>
> "My problem in this connection is the connecting of the merchandise that went to the farm with that which is subject to this offense, or being a part and parcel of the merchandise fraudulently disposed of, knowingly and fraudulently contrary to the bankruptcy act.
>
> ". . . There is no evidence that this merchandise that was taken in was actually, and has been identi-

fied as the property of the Palm Furniture Company. . . . ."

After making reference to another case which had been reversed by the Court of Appeals, the trial judge then said:

> "The Court threw out Judge Thornton's conviction of that cause under the theory of choice of probabilities. And here we have I don't know how many choices of probabilities with respect this load full of furniture. In fact, it is loaded with inferences, suspicions; strong, yes, but I am impressed by Mr. Louisell's argument as to why wasn't there a search warrant issued. Why isn't there a claim made on the part of the trustee. Is there any real identity of the furniture in the place, or that which was taken out there. Is there any real identity—is there any identifying means through which substantial proof can be made that it is the same furniture that belongs to the Palm Furniture Company. There are vast intervals of time in there which maybe someone else —again probabilities—choice of probabilities that we are talking about in the Sauders case—that other furniture could have been put in those warehouses by friends of Mr. Ayotte's."

Based on the above analysis, the trial judge granted a motion for judgment of acquittal as to Mr. Rubino. However, he denied the motion for judgment of acquittal for the petitioner, and later convicted him. The conviction was affirmed by the Court of Appeals. In finding the petitioner guilty, the trial judge adopted as his findings of fact the statements contained in the United States Attorney's final argument. The United States Attorney laid great stress in his final argument upon these two warehouses, and the fact that merchandise belonging to Palm Furniture was stored therein, and that petitioner participated with Ayotte in the removal of some of this furniture to Mr. Rubino's

farm. (Tr. 2313-2315). In fact, in his final argument, the United States Attorney assumes without arguing that the merchandise in these warehouses belongs to Palm Furniture Company, and represents part of the $80,000 in merchandise unaccounted for. Without reference to any of the choices of probabilities referred to in acquitting Mr. Rubino, for lack of identity which he found regarding the furniture in such warehouses, the trial judge adopts as his findings of fact the argument of the Government attorney.

Petitioner respectfully submits that he is entitled to the same doubts as to the probative value of the evidence as is Mr. Rubino. The same evidence relating to this property was introduced against the petitioner as was introduced against Mr. Rubino. The Court has made an inconsistent determination of fact, based on identical evidence relating to identical property involved in the identical transaction between these two defendants. If the evidence establishing the identity of the property in the warehouses on Mack Avenue is insufficient, it is insufficient for all purposes. To say that Mr. Rubino is not guilty because there is no evidence that the furniture moved to his farm belonged to Palm Furniture, but Mr. Giordano is guilty because he helped move it there deprives the petitioner of the benefit of the doubt which the trier of the fact has already found to exist.

Petitioner respectfully submits that when a judge sits without a jury, his findings of fact with respect to any particular items of evidence apply equally to all defendants. If a doubt exists with respect to a link in the chain of evidence, such as in this case the identity of the property as belonging to the bankrupt, that doubt must be resolved in favor of all defendants equally, and to deny to any one defendant the benefit of that doubt is to deny him a fair trial and the equal protection of the law.

This is not to say that a judge sitting without a jury cannot find one defendant guilty and the other not guilty.

It is only to say that where evidence as to a particular link is found deficient, it is unfair to deny any defendant the benefit of the doubt created by such deficiency.

In the instant case, the court found a doubt as to the identity of the merchandise in the warehouses as belonging to the bankrupt estate. Based on that doubt, Mr. Rubino was acquitted. However, the court then ignored that doubt, and in convicting the petitioner, found that the property did belong to Palm Furniture. This finding was used to substantiate the contention that the petitioner had contact with the bankrupt and the property of the bankrupt after the bankruptcy proceedings had been instituted. This assertion was also relied upon by the Court of Appeals in affirming the conviction of the petitioner, wherein the Court of Appeals stated at great length the activities of the petitioner and Ayotte with reference to the two warehouses. (App. 34-35)

Petitioner submits that this Court should grant certiorari to correct the obvious injustice which has resulted from the denial of the benefit of the doubt specifically found by the trier of the facts with reference to the identity of the furniture in the warehouses, to the petitioner.

4. The fourth question presented by this Petition presents an issue which goes to the heart of this entire case. The petitioner respectfully submits that the issue presented thereby is of substantial importance to the administration of the federal criminal and bankruptcy laws, and the implications presented by the decision of the Court of Appeals on this issue should be corrected and defined by this Court to prevent substantial injustice to employees of unscrupulous bankrupts.

The Court of Appeals affirmed the conviction of the petitioner on the basis that he was intimately involved in the subject matter of the conspiracy and thus an aider and

abettor in the substantive crime of his employer. This ruling, if allowed to stand, could serve as a precedent which would bring all the horrors noted by Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 93 L.Ed. 790 (1949) to pass, and in addition some which were not foreseen in his opinion.

The evidence against the petitioner presented by this record is summarized in the Statement to this Petition. In essence it indicates that the petitioner was employed as a buyer and sales manager by the bankrupt Ayotte. In such capacity, he made contacts with suppliers, had the power to write checks on the bank account (which was never exercised), made sales and on one occasion conveyed his employer's wish to rent warehouse space to a friend who was in the real estate business. These acts are those which one would normally expect a buyer and sales manager to perform. The evidence is clear that whenever a question of financing or credit came up, the supplier was referred to the owner, Mr. Ayotte. The petitioner had nothing to do with the books and records of the company, or the preparation of accounting or financial statements. There is no showing that he was ever in possession of any of the assets of the company. In fact, the government's own evidence indicates that two months prior to his employment with this furniture company, he made a legitimate purchase of furniture for his personal use from a different company, and financed it through a small loan company, obtaining an advance from his employer to make a payment on his account. Surely if he were concealing assets of a furniture company at that time, he wouldn't undergo the strain of paying for furniture from another source.

However, the Court of Appeals, in finding his conviction was sustained by the evidence, did so on the basis that he was "intimately involved" in the subject matter of the con-

spiracy, and based on such intimate involvement, thereby imputed to him the necessary elements of knowledge and fraudulent intent. Petitioner respectfully submits that such a finding is inconsistent with the prior decisions of this Court as to the elements necessary to constitute one a co-conspirator, and is also inconsistent with decisions of the various Courts of Appeals with regard to conspiracy and aiding and abetting.

In *Krulewitch v. United States,* 336 U.S. 440, 93 L.Ed. 790, Mr. Justice Jackson, in a concurring opinion, pointed out the dangers of expanding the concept of criminal liability through the device of conspiracy. He said:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comments because it is characteristic of the loose evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the tendency of a principal to expand itself to the limit of its logic. The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in the administration of justice."

In *Nye & Nissen v. United States,* 336 U.S. 613, 93 L.Ed. 919, 929 (1949), Mr. Justice Frankfurter, in a dissenting opinion, stated:

> "Clarity as to the ground on which a criminal conviction is sustained is indispensible to Anglo-American notions of criminal justice; it is no less indispensible for the guidance of district courts in future prosecutions for conspiracy. Such prosecutions are appropriate to reach a combination united to accomplish a defined criminal purpose; the concept of conspiracy is not an invitation to circumvent the safeguards in the prosecution of crime which are the

> special boast of our democratic society by making it a device to establish guilt, not on the basis of personal responsibility but by association, and we should be at pains to forestall the implication that we have so extended it."

It has always been understood that to be guilty of aiding and abetting, or to be a co-conspirator, there must be knowledge of the criminal purpose of the principal and a sharing of the intent, and in addition there must be direct or circumstantial evidence of an agreement to support a conspiracy. Mere association with the alleged conspirator or principal, or even the doing of acts which assist him in his criminal purpose is not sufficient, absent the knowledge of such criminal purpose, or an agreement between the parties to effectuate such criminal purpose. (*United States v. Kompinski,* (C.A. N.Y. 1967) 373 F. 2d 429; *United States v. Cherry,* (C.A. N.C. 1961) 295 F.2d 842; *Van Huss v. United States,* (C.A. N.M. 1952) 197 F.2d 120; *United States v. Guiliano,* (C.A. N.J. 1959) 263 F.2d 582; *Bacon v. United States,* (C.C.A. Okl. 1942) 127 F.2d 985; *United States v. American Precision Products Corporation,* (D.C. N.J. 1953) 115 F.Supp. 823.)

In *Hernandez v. United States,* 300 F.2d 114 (9th Cir. 1962) the Ninth Circuit reversed the conviction of the defendant for aiding and abetting, stating:

> "The aider and abettor is made punishable as a principal, not as an offender in some special category, and the proof must encompass the same elements as would be required to convict any other principal. 'To find one guilty as a principal on the ground that he was an aider and abettor, it must be proven that he shared in the criminal intent of the principal . . . *Johnson v. United States,* 195 F.2d 673 (8th Cir. 1952). Again, to argue that the proof of the intent necessary to make defendant an aider and

> abettor may be supplied by attributing possession of narcotic drugs to the defendant on the ground that he is an aider and abettor of a principal who is shown to have actual or constructive possession, is to assume the premise which one purports to prove."

In *Ah Ming Cheng v. United States,* 300 F.2d 202 (1962) the Court held:

> "It is, of course, well established that it is not the function of the appellate court to weigh evidence anew to try to determine the credibility of witnesses heard at trial. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government to support it. Cf. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.
>
> "But it is equally well established, that, where a case rests, as this one does, entirely upon circumstantial evidence, the circumstances must be so clearly proven that they point, not merely to the possibility or probability of guilt, but to the moral certainty of guilt. In other words, the inferences which may reasonably be drawn from the facts proven as a whole must not only be consistent with guilt, but inconsistent with every hypothesis of innocence."

The Court, then, finds there is not sufficient evidence to establish the defendant's knowledge of a conspiracy, and in so doing quotes the following from *Kassin v. United States* (5th Cir. 1937) 87 F.2d 183, 184, with approval:

> "It was of a piece with the whole theory of the prosecution, that proof that his co-defendants were guilty, that, using assumed names, appellant had registered at hotels in Florida where some of his co-defendants were registered, and that he had a safety deposit box in a bank where some of his co-defendants had boxes, had put him upon proof of his in-

> nocence. This will not do. Wide-sweeping and damaging as is a charge of conspiracy, difficult as it is for one caught in the net of such a charge to extricate himself from it when the government has any evidence tending to connect him with it, such a charge, no less than charges of substantive offenses, requires proof. This proof may be circumstantial or direct, or both, but it must be proof. That is, the evidence must have a legitimate tendency to compel belief in and finding of defendant's guilt."

In the case at bar, the Court of Appeals found that the defendant was a co-conspirator and an aider and abettor (thereby becoming a principal) in Ayotte's schemes, merely because he was intimately involved in the subject matter thereof. The Court impliedly, without even discussing the issue, thereby imputes from such intimate involvement, the necessary intent to be an aider and abettor, and the necessary agreement to constitute a conspiracy.

The intimate involvement of the petitioner in the activities of Ayotte, as can be seen from an examination of the entire record, all took place prior to the institution of bankruptcy proceedings. The petitioner was an employee of Ayotte, and each and every act or utterance attributed to him were acts and utterances which such an employee would perform in the course of his employment. Because of the unscrupulous plans of Ayotte, these acts and utterances of the petitioner, though on their face entirely legitimate, contributed to and assisted Ayotte in the perpetration of his illegal purpose. However, there is no evidence, other than the doing of these acts which any ordinary employee of a furniture store would be expected to do, that the petitioner had any knowledge of Ayotte's plans.

The implications of criminal liability which can flow from the ruling in this case to innocent employees of unscrupulous businessmen are so far-reaching as to be almost

incomprehensible. Since every employee is intimately involved in the activities of his employer, the test applied by the Court of Appeals in the instant cause could result in every employee of a bankrupt employer who conceals his assets being a potential felon. Such a result would expand the dragnet of conspiracy beyond anything Congress or this Court has ever imagined, and this Court should grant certiorari to correct this decision before such implications become reality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Detroit, Michigan 48226,
Counsel for Petitioner.

January 31, 1968.

APPENDIX A

Nos. 17080-81

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America, *Plaintiff-Appellee,* v. Eugene Ellsworth Ayotte and Samuel Joseph Giordano, *Defendants-Appellants,*	Appeal from the U. S. District Court for the Eastern District of Michigan.

OPINION

Decided December 4, 1967.

Before WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

O'SULLIVAN, Circuit Judge. Appellants Ayotte and Giordano were convicted of conspiracy to conceal, (Count I), and of concealing, (Count II), from the bankruptcy court and its officers, assets belonging to the estate of a bankrupt enterprise, viz: Henry Oliva d/b/a Palm Furniture Company, in violation of Sections 2, 152 and 371 of Title 18 U.S.C. Count I also charged transfer and concealment of assets in contemplation of bankruptcy, and receipt of property and proceeds of the business after the filing of bankruptcy proceedings. The case was tried to a District Judge for the Eastern District of Michigan. A codefendant, one Rubino, was acquitted of all counts and the appellants, with him, were acquitted of the indictment's third count.

Appellants' venture was short-lived and transparently criminal. In May of 1960, appellant Eugene Ellsworth Ayotte, using an alias—Henry Oliva—entered into a lease of a store building in Detroit, Michigan. The two-year term of the lease began on May 27, 1960. Ayotte paid $3,000 advance rent for the first six months of the lease. Ayotte chose Palm Furniture Company as the assumed name for his planned operation and, obedient to Michigan law, filed a certificate of assumed name with the Wayne County Clerk, describing the concern as "Henry Oliva, d/b/a Palm Furniture Company." Exhibiting a copy of this certificate, Ayotte, as Henry Oliva, opened an account in a branch of the National Bank of Detroit with a deposit of $1,600. With Ayotte, when he opened this bank account, was his codefendant, appellant Samuel Joseph Giordano, who chose the alias Joseph Cardo for his participation in the involved enterprise. Both were authorized to sign checks on the Palm Furniture Company account. On June 20, 1960, shortly after the opening deposit, Ayotte deposited an additional $10,000 in the bank. This, as well as the opening deposit, was all in cash—mainly in bills of large demoninations.

The Palm Furniture Company then began an active business. Broad varieties of furniture and appliances were purchased, from a large number of suppliers, and some sales were made out of the rented premises. Through its short history, Ayotte and Giordano were active in carrying on the buying and selling of Palm Furniture Company's goods. Giordano, using the name of Joe Cardo, appeared to be next in command to Ayotte, the apparent owner. Suppliers desiring to sell asked for credit information from Dun and Bradstreet. This concern's representative met Ayotte, as Oliva, and made inquiry as to his background and financial history; this was followed up by receipt of

a form containing Ayotte's background and financial position. It was fair to assume that the report was false.

The business began in early June and was on its way out shortly after the middle of August, with creditors pressing for payment of accounts; a small quantity of goods was seized by writs of replevin, and in late August on several occasions visitors found the place closed during normal business hours. During the course of the operation, at least two buildings—described as warehouses or stores —were rented by Ayotte and furniture or appliances were moved into and out of them. Giordano, as Joe Cardo, participated in some of these activities. On August 26, 1960, an involuntary petition in bankruptcy was filed and a receiver appointed for the alleged bankrupt Palm Furniture Company. The receiver promptly took possession of the store and its few contents. Prior to the receiver's takeover, a deputy sheriff had been unable to serve a writ of replevin because he found the store closed. He called the landlord, who let him in, and then changed the locks on the doors. On this occasion the deputy sheriff told the landlord that Palm Furniture had gone bankrupt. The landlord then got a call from Ayotte who angrily demanded the new key. The landlord refused, saying to Ayotte, "You went bankrupt." Shortly thereafter a lawyer called demanding the key on behalf of his client, Ayotte. The landlord said he had refused to give the key to Ayotte because "he [Ayotte] went bankrupt." The landlord then gave the key to this attorney. When at the premises on the first occasion, the receiver posted a notice that as receiver in bankruptcy he had taken possession of the premises and the contents. He had located the keys in the possession of Ayotte's lawyer. The keys were delivered to the receiver on August 31, but the evidence does not disclose who delivered them, although the receiver's secre-

tary's receipt acknowledges their acquisition from Palm Furniture.

There was evidence that during the involved operation Ayotte rented some warehouse or storage space in several vacant buildings; furniture and appliances were seen there and were sometimes moved out of there. A witness who had theretofore known Ayotte as John Wymore entered into a lease of an unfurnished apartment for a term of one year beginning September 1, 1960. This succeeded an earlier lease of a furnished apartment; it was signed by Ayotte, then employing the name of John DeSanto. Ayotte said that his then change of name was due to a family matter.

A government witness testified that, on behalf of Ayotte, he rented a vacant store at 8425 Mack Avenue, Detroit, for the period from August 3 to September 3, 1960; that during said period goods and merchandise from the Palm Furniture Company had been moved into the premises; that a week or so after the Palm Furniture store had been closed, Ayotte told him that "the creditors had closed the store." The daughter of the owners of these premises leased them to Ayotte's representative. She saw merchandise in the store after the end of the lease, September 3, for about two weeks; then she found the premises emptied and the doors left open. The keys were never returned to her. Another building at 17415 Mack Avenue, Detroit, as a result of negotiations initiated by appellant Giordano, was rented in behalf of Palm Furniture Company for the month of August. Furniture was moved in and out of the building, though no business was carried on there. Toward the end of August, the landlord one morning found that "everything had been removed from the building."

The activities of removing furniture from the several warehouses rented by Ayotte in August, 1960, went on after Palm Furniture had, as was known by Ayotte, been "closed

by creditors," and after a receiver in bankruptcy had been appointed and had taken possession of Palm Furniture Company. One witness who had worked for Palm Furniture for one week during the summer of 1960 testified that in the fall of that year, after Palm had been closed, Ayotte hired him to help move some furniture. He assisted Ayotte and Giordano, after a rental trialer had been procured, in moving certain bedroom furniture from a storefront warehouse on Mack Avenue to a farm near the Algonac-Marine City area, northeast of Detroit. The owner of a Detroit trailer rental lot produced business records evidencing a rental to one Eugene C. Ayotte on September 19, 1960.

Another witness had a like experience, assisting Ayotte in the fall of 1960 in picking up several stoves and a refrigerator from a small warehouse on Mack Avenue and transporting them to a farm east of Detroit. He had worked for Palm for one month during the summer of 1960, and on one occasion had been sent to the same warehouse to pick up a refrigerator to bring back to the Furniture Company. At that time, the warehouse was "about full" of the merchandise handled by the Palm Furniture Company.

An accountant from the Federal Bureau of Investigation obtained the available books and records of Palm Furniture and from them reconstructed its short-lived financial history. He found evidence of unpaid or partly paid invoices in the amount of $89,280.28 covering the period of Palm's operation; there were only $5,762.15 in paid-up invoices. From these figures and several others he concluded that there had been $101,042.43 in total purchases at cost. His inventory of merchandise on hand as of September 1, 1960, showed $5,743.50 at cost. (This netted $4,513.50 at auction.) He added to the $5,743.50 inventory an estimated amount of $10,474.80 for sales, based upon the record of

deposits made to the Palm bank account during the period of operation. Subtracting these two amounts from the $101,042.43, he computed that merchandise received and not accounted for totaled $84,824.13 at cost. By examining check stubs from the Palm account, he was able to estimate that the total amount paid out to suppliers during the whole business life of Palm Furniture was $10,243.33. His schedule of amounts claimed by the various creditors bore these figures out. See *Rudin v. United States,* 254 F(2) 45 (6th Cir. 1958), wherein Judge Shackelford Miller, Jr., discusses the propriety and probative value of similar computations.

Upon the filing of the petition for involuntary bankruptcy, process was issued for service on Henry Oliva, d/b/a Palm Furniture. The United States Marshal who attempted service returned it not found and substituted service was made. There was no direct evidence that appellants Ayotte or Giordano were effectively notified or knew of the filing of the bankruptcy petition; there was evidence that Ayotte was, under the advice of his attorney, staying "under cover" following the bankruptcy. Neither of the appellants testified.

We have, at the above length, set out the government's evidence because the only substantial question presented by appellants is whether the evidence was sufficient to permit the District Judge to find them guilty of the crime charged. We are satisfied that it was, and affirm the District Court.

Familiar rules guide us to this conclusion. Guilt may be established by circumstantial evidence. *Holland v. United States,* 348 U.S. 121, 139-40, 99 L. Ed. 150, 166-67 (1955); *United States v. Carter,* 311 F(2) 934, 940 (6th Cir. 1963), *cert. den.* 373 U.S. 915; *United States v. Decker,* 304 F(2) 702, 705 (6th Cir. 1962); *United States v. Comer,* 288 F(2) 174, 175 (6th Cir. 1961). In determining whether there

was sufficient evidence to allow the trier of the facts—in this case the District Judge—to convict, the evidence and legitimate inferences to be drawn therefrom are viewed in a light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 80, 86 L. Ed. 680, 704 (1942); *United States v. Conti,* 339 F(2) 10, 13 (6th Cir. 1964); *United States v. Berkley,* 288 F(2) 713, 716 (6th Cir. 1961); *Battjes v. United States,* 172 F(2) 1, 5 (6th Cir. 1949). The broad pattern of the case at bar is familiar to this Court. See *United States v. Vida,* 370 F(2) 759 (6th Cir. 1966); *United States v. Blane,* 375 F(2) 249 (6th Cir. 1967).[1] We think the District Judge could quite easily find that the plan and activities of Ayotte and Giordano fitted the often quoted language of Judge Learned Hand in that it was a scheme,

> "to obtain supplies, make quick sales, collect the proceeds, and then allow the company to fall into bankruptcy, making off with such loot as might meanwhile have been gathered." *Kaplan v. United States,* 7 F(2) 594, 595 (2nd Cir. 1925).

There was ample evidence that in the little over two month's life of Palm Furniture Company, Ayotte and Giordano, using the aliases Henry Oliva and Joe Cardo, respectively, were the operating managers of the venture. Within this short time they bought merchandise in cost amount of about $100,000, paying out only about $10,000, and then sometime in August abandoned the store premises, leaving a relatively small amount of merchandise in the store. They then apparently, went "underground"

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[1] See also this Court's unpublished order in *United States v. Eugene Ellsworth Ayotte,* No. 17,185, March 2, 1967, *cert. den.* October 10, 1967, 36 U.S.L. Week 3144, wherein we affirmed Ayotte's conviction of transferring and concealing assets in contemplation of bankruptcy of an enterprise which he carried on after closing of the Palm Furniture Company. He then used the name Louis Beatrice in the operation of the Grosse Pointe Jewelry Store.

while their creditors were forced to institute bankruptcy and have the visible remnant of the inventory seized. In the meantime, goods were being moved to vacant stores and after the commencement of bankruptcy one, or more, of these stores was emptied of a cache of supplies—both appellants participating in removing assets out of the city of Detroit. It is indeed a fair inference that these goods were purchased by Oliva, d/b/a Palm Furniture, and rightly were a part of the bankrupt estate and under all the circumstances it could be inferred that the removal of the goods before bankruptcy was in contemplation of its inevitable happening. In *United States v. Weinbren,* 121 F(2) 826 (2nd Cir. 1941), the Court said:

> "But if the [Court] found, as well it might, that these appellants, knowing that the bankruptcy • • • was soon to follow, conceived and brought about the secret removal of assets from the store • • • and that their real purpose was to convert the goods permanently and fraudulently to their own uses; and to that end to conceal them from whomsoever necessary to accomplish their purpose, a finding that concealment from the trustee in bankruptcy was deliberately planned and carried out was justified." *Id.,* at 828.

The fact that there was no direct evidence of an agreement between appellants to conceal assets in contemplation of bankruptcy and no direct proof that they were immediately aware of the institution of bankruptcy, does not render insufficient the government's evidence. The following from *Greenspahn v. United States,* 298 Fed. 736, 738 (7th Cir. 1924), is pertinent in this regard:

> "While no witness testified that a bankruptcy proceeding was in actual contemplation of the alleged conspirators, this does not necessarily bar conviction for a conspiracy to violate section 29b. Conspiracy

to violate this section may be shown, without any proof of appointment of a trustee, or of pendency then or thereafter of bankruptcy proceedings. Meyer v. United States, 258 Fed. 212, 169 C.C.A. 280; Steigman v. United States, 220 Fed. 63, 135 C.C.A. 631; Radin v. United States, 189 Fed. 568, 111 C.C.A. 6; United States v. Cohn (C.C.) 142 Fed. 983.

"Persons must be held to intend the natural and reasonable consequences of their acts. Where insolvents, heavily in debt and evidently reaching a crisis in their affairs, deliberately conceal a considerable part of their tangible assets, they should be held to have had in contemplation that the normal consequences would unsue, that the bankruptcy laws of the land would have application, and that a trustee in bankruptcy would in due course be constituted." 298 Fed. at 738.

There was sufficient evidence to permit the District Judge to consider the question of the guilt of appellants on both Counts I and II, and the conviction is amply supported by the evidence. While Giordano, alias Joe Cardo, occupied a junior position to Ayotte, and his activities were less observable, he could clearly be identified as aiding and abetting in the substantive offense in Count II (which contained a charge of aiding and abetting, 18 U.S.C. §2); as such, he was intimately involved in the subject matter of the conspiracy charge in Count I of the indictment.

Judgment affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17,081

United States of America,
Plaintiff-Appellee,
v.
Samuel Joseph Giordano,
Defendant-Appellant.

Before: WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

JUDGMENT

(Filed December 4, 1967)

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court

Issued as Mandate:
Costs: None.

/s/ Carl W. Reuss,
Clerk.

APPENDIX B

Text of Title 18 U.S.C. §2:

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done, which, if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Text of Title 18 U.S.C. §152:

"Whoever knowingly and fradulently conceals from the receiver, custodian, trustee, marshal or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

"Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

"Whoever, knowingly and fraudulently presents under oath any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney, or

"Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

"Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

"Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to refeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or

"Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

"Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt,

"Shall be fined not more than $5000. or imprisoned not more than five years, or both."

Text of Title 18 U.S.C. §371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000. or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."